

CHAPTER 10 PERFORMANCE BONDS

PERFORMANCE BOND REQUIREMENT

The National Park Service's 9B regulations require that an operator file a performance bond for all types of nonfederal oil and gas operations and all phases of the operation(s). The bond is in addition to any other bonds the operator may have to provide to the state or other federal agencies. A performance bond is a measure of insurance (currently up to \$200,000) for the NPS so that the operator will comply with the terms and stipulations of the approved plan. The bond amount is not, however, the limit of liability for damage to park resources. Under the 9B regulations the operator is responsible for all damages to park resources for failure to comply with the approved plan of operations, temporary approval permit, or where existing operations are allowed to continue, failure to comply with the applicable permit. Depending upon the type of damage, an operator may also be held liable under other statutes including the Park System Resource Protection Act, 16 (U.S.C. § 19jj), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Resource Conservation and Recovery Act (RCRA), and the Oil Pollution Act (OPA). For additional information on these laws, see *Appendix B - Federal Laws, Regulations, and Policies Applicable to Nonfederal Oil and Gas Operations*.

Either the NPS or the operator can petition to amend the bond amount. The regional director of the NPS is responsible for determining the proper bond amount. The determination shall be based on a written evaluation contained in the NEPA documentation prepared for a proposed plan of operations. Below is some key information regarding performance bonds, including: the types of performance bonds that are acceptable to the NPS, basic information that should be included in the bond, and how the regional director will determine an appropriate bond amount for a particular operation.

ACCEPTABLE TYPES OF SECURITIES

- Corporate Surety Bond (most common type of surety used),
- Irrevocable Letter of Credit,
- Cash,
- Cashier's Check,
- Certified Check,
- U.S. Postal Money Order,
- U.S. Treasury Bond,
- U.S. Treasury Bill, or
- U.S. Treasury Note.

REQUIREMENTS FOR CORPORATE SURETY BONDS AND IRREVOCABLE LETTERS OF CREDIT

CORPORATE SURETY BONDS

- Acceptable surety company,
- Acceptable bond format,
- Adequately cover total bond amount,
- Authorized signatures, and
- Surety company must consent to liability and waive notice for revisions, amendments, or other modifications to the plan of operations covered by the bond.

CRITERIA FOR ACCEPTABLE SURETY COMPANIES

Surety companies must:

- Be listed in the most recent Department of Treasury Circular 570 (circular lists companies holding certificates of authority as acceptable sureties on bonds payable to the federal government). Circular 570 is available on the web at <http://www.fms.treas.gov.c570/index>,
- Be licensed to transact business in the state in which the company or its agent executes the bond. (license information is in Circular 570),
- Appoint an agent to accept federal service of process on behalf of the company in the federal judicial district where the principal resides, where the obligation is to be performed, and in Washington D.C. (process agent information is included in Circular 570), and
- Have an underwriting limitation sufficient to cover the penal sum of the bond, or furnish a coinsurance or reinsurance agreement with another company identified in Circular 570.

IRREVOCABLE LETTER OF CREDIT

An irrevocable letter of credit must:

- Be issued by a bank that is a member of the Federal Reserve System, or insured by the FDIC,
- Include one, and only one letter of credit number,
- Carry a Standard and Poors "A" rating,
- Be clearly irrevocable,
- Include the name of the principal,
- State the maximum limit of credit extended,
- Include a credit limit that equals or exceeds bond amount,
- Include an authorization to draw sight drafts upon the issuing institution in favor the National Park Service,
- Clearly state that the letter of credit number appearing on a sight draft is sufficient for honoring that sight draft, and
- Include an expiration date for presentation of drafts for payment.

A sample *Model Letter of Credit* that can be used by an operator is included at the end of this chapter.

BOND AMOUNTS AND LIMITATIONS

The regional director is responsible for determining the proper amount of the operator performance bond. The operator's bond amount is determined as follows:

$$\text{Estimated cost of reclamation} + \text{liability amount} = \text{total bond amount}$$

COST OF RECLAMATION

The cost of reclamation includes the following:

- Cost of plugging the well(s),
- Removal of all equipment and debris,
- Restoration of topographic grade,
- Topsoil replacement,
- Vegetation planting/seeding,
- Exotic species control, and
- Reclamation monitoring.

LIABILITY AMOUNT

The liability amount includes the following:

- Potential amount of oil that may be spilled, in a worse case scenario, and the estimated cost to contain and clean up such a spill and restore damaged resources;
- Potential amount of hazardous substances and waste that may be spilled, in a worst case scenario, and the estimated cost to contain and clean up such a spill and restore damaged resources;
- Potential extent of damage to park resources resulting from a fire, and the cost to contain and extinguish a fire and restore damaged resources; and
- Potential for release of harmful or toxic gas, and the cost to secure the area and restore damaged resources.

REGULATORY LIMITATIONS ON TOTAL BOND AMOUNTS

LIABILITY CAP

- \$5,000 for a single party geophysical operation
- \$25,000 for a multiple party geophysical operation (e.g., most 3D seismic operations); or
- \$50,000 for each exploratory well, production, or pipeline operation.

CAP ON TOTAL BOND AMOUNT

- For a single operation or multiple operations the total bond amount may not exceed \$200,000.
- For a production operation, the maximum the NPS could require is \$200,000 (\$150,000 for reclamation + \$50,000 for liability).
- If one operator is conducting multiple operations in a single park, the total bond amount the NPS can require of the operator for **all** of its operations is \$200,000.
- Bonds are for each specific park, and are not for a NPS system-wide or government blanket bond.

GETTING A PERFORMANCE BOND RELEASED

TRANSFER OF OPERATIONS

If an operator transfers a production operation to another operator, the transferring operator remains liable under the bond until the superintendent is given notice of the transfer (within 60 days of the transfer) and the superintendent determines that the transferring operator was in compliance with plan of operations at the time of the transfer.

A Model Form for a Performance Bond and Model Letter of Credit are included below to assist operators in securing a performance bond for their operation(s).

MODEL FORM FOR A PERFORMANCE BOND (CORPORATE SURETY BOND)

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS:

THAT WE, (Operator) , as Principal, and (Surety) , a corporation duly incorporated under the laws of the State of (State) , and authorized to do business in the State of (State in which Park is located) , as Surety, are held and firmly bound unto the U.S. Department of the Interior, National Park Service ("NPS"), Director, (NPS Region) Region ("regional director") in the sum of (Dollar Amount) (\$000,000.00) for the payment of which we hereby bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

THE CONDITIONS OF THIS BOND ARE SUCH that the Principal has submitted to the NPS a plan of operations to conduct (Type of Operation) in (Park Name) , (State) , in accordance with the requirements of 36 C.F.R. Part 9, Subpart B. Upon NPS approval of the plan of operations, the Principal shall faithfully comply with all terms and conditions of the plan, or any revision, amendments, or modifications thereto [hereinafter "approved plan of operations"], including all applicable federal, state, and local laws. The Principal and Surety shall be held jointly and severally liable for any and all damages to federally owned or controlled lands, waters, or resources resulting from the Principal's failure to comply with the terms and conditions of the approved plan of operations. If, at any time during operations, reasonable efforts to secure the Principal's compliance with any provision of the approved plan of operations fail, the regional director may attach any or all of the bond amount necessary to remediate or reclaim federally owned or controlled lands, waters, or resources damaged by the Principal's failure to comply with the terms and conditions of the approved plan of operations. The regional director may also require that the Surety perform reclamation in accordance with the approved plan of operations. Surety hereby waives notice for revisions, amendments or other modifications to the approved plan of operations covered by the bond. The Principal and Surety agree to hold the United States and its departments, agencies, and employees harmless from any damages or liabilities incurred by reason of his/her engaging in said business.

NOW, THEREFORE, notwithstanding any other provision of law or regulations, until such time as the regional director has notified the Principal that it has successfully reclaimed the area of operations and has performed all other duties and responsibilities as described in the approved plan of operations, for a (Type of Operation) at (Park Name) in, (State) according to the requirements of 36 C.F.R. Part 9, Subpart B, and has protected the United States and its departments, agencies, and employees from any damage or liability claim as herein before stated, this obligation shall remain in full force and effect.

This bond may be terminated as to future acts of the Principal upon written notice by the Surety. Written notice shall be given at least sixty (60) days prior to termination. Said notice shall be sent to superintendent, Attention: (Full name and Address of Resource Manager in Charge of Park's Nonfederal Oil and Gas Operations) by certified mail.

This agreement supplements, and is not in lieu of, the terms, conditions, duties and responsibilities contained in 36 C.F.R. Part 9, Subpart B, or in any other federal, state, or local

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law or regulation. This agreement shall not limit any claims or causes of action against the Principal or Surety otherwise available to the United States under any other federal law or regulation to protect, reclaim, or remediate federally owned or controlled lands, waters, or resources in _____ **(Park Name)** _____, **(State)** _____. This bond becomes effective on the ____ day of _____, 20____, and is continuous in nature until terminated.

SIGNED:

Principal

Date

Surety

Date

MODEL LETTER OF CREDIT

NOTE: This letter is optional. Operators may elect to convey its interest to undertake nonfederal oil and gas operations in the park to the park's nonfederal oil and gas program contact by telephone. However, the park's receipt of a copy of the operator's legal instrument is required to begin the 36 CFR 9B permitting process.

To: United States Department of the Interior
National Park Service
(insert name of Park)
(insert mailing address for Park)

IRREVOCABLE LETTER OF CREDIT

Issuing Financial Institution: (insert name)
Telephone No: (insert 10-digit number)
Address: (insert full mailing address)
O&G Lease No. : (insert name and any assigned name/title)
Date Issued: (insert date)
Letter of Credit No. (insert number)
Amount: (insert dollar amount)

On behalf of (insert name of operator and full mailing address), as Obligor, we (insert name of issuing financial institution) hereby establish an irrevocable Letter of Credit (LOC) in favor of the United States Department of the Interior, National Park Service, (insert name of park) (NPS) and agree to immediately pay upon demand by and to the NPS the full amount of (spell-out dollar amount) (\$000,000.00) upon receipt of written demand by the NPS.

This LOC is effective the date issued and will expire exactly one year from the date issued. In the absence of a notice from the bank to the NPS at least 30 days prior to the stated or any extended expiration date not to renew the LOC, the LOC will be automatically renewed in full force and effect for an additional one year period.

Upon receipt by the NPS of a non-renewal notice from us, the NPS may draw on us by sight draft identified by Letter of Credit No. (insert number) for up to the amount of this LOC, prior to the expiration thereof, provided that such draft is accompanied by a statement signed by the Regional Director of the (insert name of NPS region) Region or his designee to the effect that no satisfactory replacement bond has been provided by the Obligor. It is also understood that, at any time this LOC is in effect the NPS may draw on us by sight draft identified by Letter of Credit No. (insert number) for any amount, up to the full amount, to cover any default by Obligor with respect to its obligations under the Plan of Operations for the above referenced lease. Such drawings shall be accompanied by a statement signed by the Regional Director of the (insert name of NPS region) Region or his designee to the effect that the obligor has been determined to be in default and the amount drawn represents the reasonable amount as determined by NPS of such default.

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It shall not be required for the NPS in order to draw on this LOC to furnish the original letter; however, it is understood as a condition of any payment thereunder that the face amount of the letter shall automatically be reduced by any payment made by the bank and that the NPS will promptly surrender the original letter when and if the bank shall tender to the NPS the full amount of funds represented by this letter; such surrender to occur as soon as reasonably practical after full payment is made. The original letter shall also be surrendered promptly following its expiration provided that no drawing on such letter was made prior to such expiration.

We assure that the amount of credit herein established will not be reduced for any reason during the effectiveness of this letter without the prior written approval of the NPS.

Letter of Credit No. (insert number)

We certify that the deposits of this bank are Federally Insured by the Federal Deposit Insurance Corporation and that this bank is a member of the Federal Reserve System.

(insert name of issuing financial institution)

by:

Vice President

ATTEST:

Senior Vice President